United States Court of Appeals

for the Second Circuit



APPELLANT'S BRIEF

75-1395

to be argued by

ALBERT J. KRIEGER

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P/S

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 75-1395

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

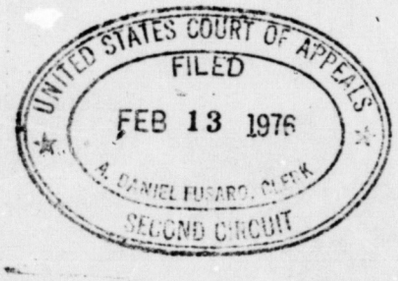
v.

OSWALDO ALFONSO-PEREZ,

Defendant-Appellant.

On Appeal from the United States District Court
for the Eastern District of New York

BRIEF FOR APPELLANT



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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 75-1395

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

OSWALDO ALFONSO-PEREZ,

Defendant-Appellant.

BRIEF FOR APPELLANT

PRELIMINARY STATEMENT

On December 12, 1974, a one-count indictment was returned against defendant-appellant Alfonso charging him with conspiracy between November 1969 and August 31, 1970 to violate federal narcotic importation laws. 21 U.S.C. §§173, 174. Following his plea of not guilty, he was tried in the United States District Court for the Eastern District of New York before the Honorable James L. Watson (sitting by designation) and a jury. On August 5, 1975, a verdict of guilty was returned, and on November 17, 1975, Mr. Alfonso was sentenced to fifteen years imprisonment. There are no opinions by the Court below, written or otherwise.

STATEMENT OF THE FACTS

Defendant-appellant does not challenge the sufficiency of the evidence. If the government's accomplice witnesses are to be believed, defendant is guilty. The entire trial keyed upon the credibility to the jury of these interested witnesses; the government offered no others. And the entire appeal turns upon issues of the fairness and propriety of that trial process. Therefore, to relate more than a brief outline of the factual situation may be unnecessary. See United States v. Phillips, 217 F.2d 435, 437-438 (7th Cir. 19754). Nonetheless, as a convenience to the Court, defendant has provided a fairly complete statement of facts.

The indictment was returned on December 12, 1974. It charges a drug importation conspiracy beginning in November 1969, more than five years before the indictment, and continuing to August 31, 1970. The allegation is that Mr. Alfonso, also known as "Alfonsito," conspired with Domingo Enrique Abreu-Gomez, also known as "Chino," and with unindicted co-conspirators, Luis Ureta-Morales, Gino Fantuzzi, and with other "persons known and unknown to the Grand Jury" to violate Sections 173 and 174 of Title 21, United States Code.

Substantially prior to trial, defendant presented a motion for disclosure of the names and identities of co-conspirators known to the government. Although defendant

argued that it would be impossible for him to prepare an adequate defense or adequately to confront the witnesses against him without such discovery, the motion was denied. At the beginning of the trial defendant requested and received from the government a list of the names of all co-conspirators known to the government (Tr. 11-18). Two of the four witnesses presented by the prosecution in its case in chief, Rene Rosquete and Wilfredo de Jesus Risco Dominguez, also known as Raul Alverez, were co-conspirators not named in the indictment and not known to defense counsel until the first day of the trial.

The government's case in chief consisted of a number of exhibits and the testimony of four witnesses, all of whom were alleged co-conspirators. The defense contended and attempted to establish that each witness was not credible and in fact was motivated to commit perjury in order to avoid further prosecution by the government, to avoid deportation, and/or to achieve reductions in pending sentences for past crimes. The defendant chose not to testify and merely presented testimony of three federal narcotics agents as to certain interviews with government witnesses in an attempt to complete impeachment of these witnesses.

-- Wilfredo Risco --

The government called Wilfredo de Jesus Risco Dominguez ("Risco"), a convicted murderer and drug trafficker, to tes-

tify that defendant had engaged in at least three narcotics transactions involving Risco. Risco said that he had known Mr. Alfonso as a fellow Cuban since 1963 and had met him in New York City in 1964 and 1965. Risco had been involved in narcotics trafficking in South America during the period 1966 through 1969. On November 16, 1969, he arrived in New York City by plane from Colombia carrying approximately one kilogram of cocaine concealed in his clothing in his suitcase. Risco testified that he began looking for a buyer, met with defendant in a New York restaurant, and offered to sell him cocaine. The defendant said that he could not accept the cocaine at that point and that he was engaged in other activities. They agreed to meet at another time and Risco subsequently sold the kilo of cocaine to another individual.

Risco testified that he met with Mr. Alfonso at the same restaurant on a subsequent occasion and that the defendant told him he had "solved the problem he had" (Tr. 177). The defendant then gave Risco a Miami telephone number where Risco could find him if he had any new business deal involving cocaine or heroin (Tr. 177). Risco returned to Colombia on about December 27, 1969.

Risco returned to the United States and went to Miami, Florida, on April 12, 1970, where he called the defendant and arranged to meet him at the defendant's home in Miami.

Risco testified that he met the defendant at his home and told him that he wanted to work in some way with drugs; that he had a connection in South America; that he did not have enough money; and that he wanted someone to back him financially (Tr. 187). The defendant stated that he was not interested in that kind of business deal. Risco then stated that he wanted to buy some narcotics on credit from the defendant. The defendant told Risco that he worked with Carlos Lorenzo and Chino Abreu "in a partnership in the business of narcotics" and that he would have to talk to them before he could enter into any deals (Tr. 190). Risco testified that the defendant then accepted $8,000 from Risco "in exchange of the credit and as an advance payment of the merchandise [cocaine] that I had come to request" (Tr. 200).

Risco further testified that defendant arranged a meeting of himself, Risco, Chino Abreu, and Carlos Lorenzo where they discussed extending credit to Risco for the purchase of cocaine. Risco testified that they also discussed whether they should "back me [Risco] in a business deal of export of cocaine," but that the other three were not interested in that arrangement (Tr. 198). They then discussed the $8,000 given to defendant by Risco and agreed that Risco would receive two kilos of cocaine and would pay an additional $12,000 as soon as possible (Tr. 201). Risco also testified that they told him that they were "expanding the nar-

cotic business and they were going to buy up small airplanes for the transportation of narcotics" (Tr. 201).

The day after the meeting, the defendant met Risco at his hotel and told him that the cocaine would be delivered to him and that he should prepare to leave the next morning by train. Risco testified that he met the defendant the following morning and the defendant told him that Chino Abreu would drive Risco to the train station and deliver the cocaine to him. Risco then met Chino Abreu, was driven to the train station, and was given two kilos of cocaine and a telephone number where he could reach Chino in Miami when Risco was ready to pay the $12,000. Risco testified that he went to New York, sold the cocaine for $40,000 in April 1970, and delivered the $12,000 to Chino Abreu in New York City.

Risco testified that he returned to Miami some time after June 21, 1970, and contacted Mr. Alfonso. Risco asked if he could obtain half a kilo of heroin. The defendant told him that he didn't have any narcotics but that some would be available soon. Risco said that defendant contacted him several weeks later and told him that he could only deliver half a kilo of cocaine to Risco because of other obligations. Risco met defendant at Risco's hotel and delivered half a kilo of cocaine to him; Risco gave defendant $9,000 (Tr. 253-255). They also spoke of the possibility of future transactions.

After selling the half kilo of cocaine in New York, Risco returned to Miami where he met with the defendant to discuss further narcotics transactions. Risco testified that he told the defendant that he wanted two kilos of heroin and the defendant told Risco, "You are going to deal for this transaction with Carlos [Lorenzo]" (Tr. 259). Risco met with Carlos Lorenzo, discussed the sale of narcotics, and arranged for delivery the next day. Risco met Carlos Lorenzo the following day at a hotel and gave $20,000 to him in exchange for two kilos of heroin at $18,000 per kilo, the balance due after Risco had sold the heroin. Risco subsequently sold some of the heroin and met with Chino Abreu in the fall of 1970 in order to pay to him $8,000 of the $16,000 he owed. Risco never repaid the remainder because he traveled to Colombia and was arrested there for a narcotics violation.

The defense relied on several facts developed during the direct and cross-examination of Risco to show Risco's motive to cooperate with the government and consequent lack of credibility. Risco had been indicted for murder in Puerto Rico in 1964 and was subject to extradition and trial on that charge. He had been convicted of robbery in Puerto Rico in 1964 and had been sentenced to three to ten years in prison. He had jumped bail and left Puerto Rico for Colombia and then to Ecuador. In Ecuador, Risco was convicted of killing a policeman and sentenced to prison, from which he bribed

his way to freedom. He was thus subject to extradition to Ecuador to serve the remainder of his sentence on the murder conviction and was subject to prosecution for bribery. And since he had been trafficking in narcotics while in Ecuador, an activity he managed to continue while in prison there, he was also liable to Ecuadorian extradition and prosecution as a drug peddler.

Additionally, Risco had been arrested in Colombia for narcotics trafficking and was being held for extradition back to Ecuador when he bribed his way out of the Colombia prison as well. He was thus subject to extradition to Colombia for prosecution for narcotics violations and bribery.

Risco had subsequently been arrested and convicted in the Southern District of New York on federal charges of receiving narcotics. Before sentencing on those charges, Risco had acted as an informant for the government in several narcotics investigations. When sentenced, he received a relatively mild sentence of two years in prison and three years parole.

These facts were developed by the defense to show Risco's lack of credibility and his motive to inculpate others in an attempt to gain leniency for himself.

Long after Risco had departed from the witness stand, the defense learned from a subpoena duces tecum (1) that on the morning of the day when the jury was selected a Deputy

United States Marshall saw Risco assault fellow prisoner and co-conspirator Gino Fantuzzi by taking a swing at him, separated the men, and observed another prisoner with injuries to both eyes; (2) that the deputy prepared an official incident report; and (3) that the prosecutor, Assistant United States Attorney Fried, was specifically notified, yet he did not advise the Court or defense counsel of this assaultive behavior by his intended lead-off witness.

When the defense learned of this course of events, it offered to prove the witness' misconduct as extrinsic impeachment evidence (as bias or interest, i.e., fear of potential prosecution) and the prosecutor's failure to disclose as spoliation of evidence. But the Court rejected these offers (Tr. 1492-1504, 1650-52).

-- Claudina Leiros, Rene Rosquete, Luis Eureta-Morales --

The testimony of the government's other three witnesses, Mildgras Claudina Leiros Filguera, Rene Rosquete, and Luis Alfredo Eureta-Morales, concerned the following transactions:

(1) a sale by defendant of one kilogram of heroin to Rosquete through Leiros in December of 1969; (2) the negotiation of a sale of fifty kilos of cocaine in South America by the defendant and Eureta-Morales; (3) Chino Abreu's trip in February 1970 to Spain to renew a source of narcotics known to the defendant; (4) the receipt of eighteen kilos of cocaine by defendant from Eureta-Morales in March 1970; (5) the receipt of ten kilos of cocaine by defendant, Rene Rosquete, and Leiros from Domingo the Chilean in March 1970. Cross-examination of these witnesses developed facts indicating that each witness had an interest in cooperating with the government which reflected on the credibility of each.

According to the testimony of Leiros, who stated that she was a prostitute and had been involved in narcotics trafficking since early 1969, she met and renewed a relationship with Domingo Abreu and defendant in December of 1969 in New York City. Leiros and Domingo agreed to work together in the drug trade, and Leiros testified that Abreu told her that the defendant and he were working together in narcotics transactions (Tr. 545). Leiros met with the defendant on a subsequent occasion and he told her he had a kilo of heroin and wanted her help in selling it (Tr. 5478-12). Leiros claimed she didn't have any way of selling it but that she would introduce the defendant to Rosquete. She then introduced defendant and Abreu to Rosquete.

Rosquete also testified that he was introduced to the defendant by Leiros. He further testified that he agreed to buy and defendant agreed to sell one kilo of heroin for $14,000 (Tr. 1017-1018). Claudina Leiros was not present in the room when this conversation occurred (Tr. 549-50) and Rosquete testified that Abreu met him in a bar the next day and gave him a package containing heroin and that he, Rosquete, gave Abreu $14,000 (Tr. 1020). This sale occurred in the first days of December 1969 (Tr 1096).

Leiros testified that in December of 1969 she introduced Domingo Abreu to Eureta-Morales and told him that Abreu was to "begin working with me in my cocaine business" (Tr. 580). Eureta-Morales told Abreu and Leiros that he was expecting a shipment of eighteen kilos of cocaine and that he would sell it to them when it arrived in Miami. In February 1970, the three of them traveled to Miami. Leiros testified that she met with the defendant and told him about the shipment of cocaine and offered to introduce the defendant to Eureta-Morales (Tr. 585). Leiros subsequently introduced the defendant to Eureta-Morales and two of his associates, Raul Adolfo Torres and Alberto the Turk, and they discussed various ways of importing narcotics. Leiros and Eureta-Morales testified that the defendant and Eureta-Morales discussed importing fifty kilos of cocaine but no agreement was reached (Tr. 592; 1235-36). Eureta-Morales testified that

he and the defendant agreed to buy the cocaine at $9,000 per kilo (Tr. 1234-5).

However, the cocaine was not delivered and Eureta-Morales flew to Chile to see what the difficulty was. Upon arrival, he found that the pilot who was supposed to smuggle the cocaine in had a problem, so he arranged to have Gino Fantuzzi and Alberto Nevado smuggle the cocaine across by car (Tr. 1242). Eureta-Morales ultimately sold the cocaine to Leiros and Abreu for $95,000 and delivered it to them in New York City (Tr. 627-29).

Both Leiros and Eureta-Morales testified that Domingo Abreu told them that he was going to Spain "to renew a connection for heroin that Alfonsito had" (Tr. 1239/14-17). Abreu said that he had to go to Spain "because he had to see some people who had been part of the French connection of Mr. Oswaldo Alfonso and that Mr. Oswaldo Alfonso was not able to go because he had problems with legal papers" and that "he would be working as a partner with Oswaldo Alfonso in this" (Tr. 596). Eureta-Morales testified that upon his return from Spain, Abreu told him that his trip had been successful and that he could get heroin for Eureta-Morales at $3,800 a kilo, but Eureta-Morales said that he was not interested (Tr. 1252).

Leiros testified that Domingo the Chilean, an associate of Leiros' Chilean connection Selim Valenzuela, had called

her, told her to go to Miami, and to wait there for a shipment of drugs. Leiros went to Miami. She testified that she contacted the defendant there and told him of the expected shipment and that he responded by saying "he would then arrange everything" (Tr. 634). Domingo the Chilean delivered ten kilos of cocaine to Leiros, and then took Leiros to the defendant's house where she informed the defendant that the drugs had arrived. According to Leiros, the defendant came to her house, sampled the cocaine to determine its quality, and then made plans with Domingo Abreu and Evo (or Ibo) Abreu to have the cocaine transported to New York. The next day, Leiros delivered the cocaine to Evo Abreu and then left on a plane for New York City. Evo Abreu met Leiros at her house in New York and told her that he had delivered the ten kilos of cocaine to Andres Rodriguez (Tr. 644). Several days later, Leiros testified that Domingo the Chilean was paid $50,000 by Domingo Abreu for six of the ten kilos of cocaine. Leiros paid off Domingo the Chilean as Domingo Abreu sold the cocaine (Tr. 647). Leiros testified that she later traveled to Miami, met with the defendant and told him that Abreu still owed her money from the sale of narcotics, and the defendant told her that Abreu had given the money to him (Tr. 649). Rosquete testified that in March of 1970 he met with Leiros, Domingo Abreau, and Domingo the Chilean, and at that time told Domingo the Chilean to de-

liver the ten kilos of cocaine from Selim in Chile to Leiros (Tr. 1033).

Facts established on direct and cross-examination of these three witnesses indicated that each had a motive to produce testimony for the government. Leiros had been convicted in 1970 in Miami for violation of federal narcotics laws, had received a sentence of twenty years in prison, and all appeals had been denied. She had also been convicted of a federal narcotics violation in New York and had received a sentence of twenty years from which she unsuccessfully appealed. Leiros agreed to "cooperate" with the government after all her appeals had been denied. At the time of trial, she was eligible for parole.

Rosquete was convicted along with Leiros in Miami in 1970 for violation of federal narcotics laws. All appeals were denied, and Rosquete was serving a seventeen-year sentence at the time of this trial. Rosquete had his wife write a letter to the sentencing judge to request a reduction of sentence. After Rosquete had given statements to government agents, his seventeen-year prison sentence was illegally reduced to time served and two years probation. In fact, the order granting the witness' motion for mitigation and vacating his sentence provided that "the imposition of sentence is hereby deferred, and the defendant is placed on probation for a period of two years. A special

condition of the probation is that the defendant shall continue to cooperate with all federal agencies" (Tr. 1081) (emphasis added). (See Tr. 941.) However, Rosquete denied knowledge of this order or that future sentencing hung over him (Tr. 1068-74; 1078-82), and the defense was unable to dispute his assertion because it was denied the opportunity to obtain, inter alia, the transcript of the sentence reduction proceeding (Tr. 911-12, 923-31, 943, 953-55, 996-1000, 1825-26). Because of this, because of the Court's failure to grant defendant's pretrial motion for disclosure of the identities of co-conspirators, because of numerous missing documents needed for cross-examination, and for other reasons, the defense moved unsuccessfully on numerous cumulative occasions to exclude the testimony of Rosquete (Tr. 926, 943-43, 1059, 1147, 1153, 1531, 1536-37, 1571, 1825-26).

Eureta-Morales was also convicted with Leiros in Miami for conspiracy to import narcotics and was sentenced to fifteen years in prison; all appeals were denied. He was thereafter convicted of escape and given a one-year sentence to be served consecutively. Eureta-Morales testified that he was told that if he cooperated with the government, "they would try to help me get a reduction in sentence" (Tr. 1195) and that the government would recommend that he be given parole when he became eligible on June 1, 1975 (Tr. 1196).

During final arguments, the prosecution argued that the defendant was guilty because he did not present testimony to disprove the government's case. At one point, while arguing that Leiros had no motive to prevaricate because to get on the stand and then be shown to be perjuring herself would only get her into more trouble, the prosecutor said: "Let's go a little further. Let's assume that the man in the room [the defendant] proves otherwise. When Claudina Leiros takes the stand she knows that a defendant in this country has the right to present evidence. . . ." The defense moved for a mistrial at this point; the motion was denied (Tr. 1783-4). At a later point in its summation, the prosecution suggested to the jury that it should "examine the cross-examination conducted by Mr. Krieger to see what information was elicited from" the prosecution's witnesses (Tr. 1808), thereby implying that "there is a burden upon the defendant to contradict certain testimony" (Tr. 1808). On a third occasion, the prosecution again implied that the defendant had an obligation to attack the credibility of a witness: "As I was saying, I would suggest that you examine the cross-examination of Luis Ureta concerning his dealings with the defendant Alfonsito. And if you do so, you will find that not one question was asked of Ureta concerning his meeting -- his only meeting with the defendant Alfonsito in February of 1970" (Tr. 1809). Defendant's motion for a mistrial "be-

cause of the assaultive effect of this inferential comment about the defendant to mount a specific defense" was denied (Tr. 1810).

Finally, the Court declined defense requests to instruct the jury (1) as to his theory of the case and (2) as to the statute of limitations (Tr. 1644-1650).

PREFACE

The order in which points on appeal are to be argued in an opening brief has prompted much scholarly opinion. Counsel is delighted to inform the Court that, hopefully, herein logic has prevailed over advocacy. The arguments appear in sequence of trial chronology, from pre-trial motions to jury instructions.

ARGUMENT

I

THE TRIAL COURT'S REFUSAL TO GRANT DEFENDANT'S PRETRIAL REQUEST FOR A LIST OF UNIDENTIFIED CO-CONSPIRATORS DENIED HIM THE RIGHT EFFECTIVELY TO CONFRONT THE WITNESSES AGAINST HIM; MOREOVER, THE TRIAL COURT'S REFUSAL TO GRANT ALTERNATIVE RELIEF OF EITHER STRIKING THE TESTIMONY OF RENE ROSQUETE OR GRANTING A CONTINUANCE TO PERMIT DEFENDANT TO ADEQUATELY INVESTIGATE AND PREPARE HIS CROSS-EXAMINATION OF ROSQUETE DENIED DUE PROCESS OF LAW AND HIS RIGHT TO CONFRONT THE WITNESSES AGAINST HIM.

The indictment charged defendant with conspiring with "persons known and unknown to the Grand Jury." In order to adequately prepare his defense, defendant made a pretrial motion requesting that the government disclose the identities of all alleged co-conspirators. This motion was denied. At the trial, Rene Rosquete, an unnamed co-conspirator whom the defense had no reason to believe would testify (Tr. 876), appeared as a witness for the prosecution. After examination of Rosquete had begun, defendant was given a continuance of only several days (over a weekend) to investigate and prepare for cross-examination. For the reasons that appear below, defendant was not afforded an adequate opportunity to cross-examine this witness. Defendant's Six Amendment rights to confront the witnesses against him and to have the effective assistance of counsel and his Fifth Amendment right to due process of law would not have been infringed had the motion to compel disclosure of the identities of all co-conspirators been granted. Defendant would then have had adequate time to investigate and prepare his cross-examination of Rosquette. The failure

to grant the motion (on Constitutional, supervisory, or Rule 7 and/or 16 grounds), or to afford the alternative relief requested as described below, was prejudicial error requiring reversal of the conviction.

Counsel for defendant had always assumed the accused conspirator must be apprised of his alleged fellow conspirators. The cases hold that the identities of aiders and abettors or co-conspirators should be disclosed in a bill of particulars, e.g., United States v. Pigone, 189 F.Supp. 532, 533 (D.Conn. 1960); United States v. Baker, 262 F.Supp. 657, 675 (D.D.C. 1966), whenever they become known to the government. United States v. Baker, supra; United States v. Covelli, 210 F.Supp. 589, 590 (N.D.Ill. 1962); United States v. King, 49 F.R.D. 51, 53 (S.D.N.Y. 1970); United States v. Rosenstein, 303 F.Supp. 210, 213 (S.D.N.Y. 1969); United States v. Ahmad, 53 F.R.D. 1974, 199 (M.D.Pa. 1971) and, the routine and entrenched practice in the New York federal courts has certainly been for the government to grant disclosure of the identities of alleged co-conspirators.

Counsel's assumption that the defendant is entitled to pretrial disclosure of such basics is fortified by this Court's recent decision in United States v. Cannone, _____ F.2d _____, 18 Cr.L 2103, No. 75-1201, 2d Cir. Sept. 26, 1975 pp. 53-66. See also, Grant v. Alldredge, 498 F.2d 376 (2d Cir. 1974). Briefly, in Cannone the Court held "that, once the defense moves for disclosure of the identity of the government's witnesses, the government bears the burden of making

a prima facie showing that such disclosure would not be in the interest of justice," slip opinion at pp. 63-64, and that the trial court's limited discretion to deny such a motion for a list of witnesses is reviewable for abuse.

In the instant case a list of co-conspirators, not a list of witnesses, is in issue. The need for such particulars is obvious and compelling. Only by the discredited "sporting event" theory of justice are they denied. See United States v. Bryant, 439 F.2d 642, 644 (D.C.Cir. 1971). Forcing defendant to trial for conspiracy without letting him know with whom he is alleged to have conspired, and then springing an unnamed and undisclosed co-conspirator upon him as a prosecution witness, "smacks too much of a trial by ambush." United States v. Kelly, 420 F.2d 26, 29 (2d Cir. 1969). And, here the government set two such witnesses upon the accused.

Defendant's inability to prepare for the testimony of Wilfredo Risco, like most negatives, is difficult to gauge.* But the problem in the instance of Rene Rosquete is an abundance of prejudice. Defendant can only hope here to adumbrate the multiple barriers to effective confrontation and cross-examination of Risco. The record must be read to fully appreciate the confusion, the lost, missing, and mishandled

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* Defendant was unable to subpoena certain records which might have been available upon earlier notice that Risco was a co-conspirator (Tr. 1522-25).

records, the destroyed records and transcripts, the vacationing court reporter, and the extreme laxity of the government's preservation of information vital to the accused (See Tr. 863-69, 873-93, 904-960, 970, 973-1001, 1036-37, 1047-67, 1147-55, 1341-44, 1355-56, 1487-88, 1492-1504, 1523-25, 1526-74, 1780-82, 1825-26).

As to Rosquete, when it became clear to defense counsel that they would be unable in the time available to them to obtain documents and information critical to their preparation to cross-examine him, they requested that the Court either strike the direct testimony of Rosquete or grant a continuance until such time as the defense had completed their investigation of Rosquete. Both requests were denied, even though defendant had uncovered information indicating that further investigation was necessary.

As soon as the defendant learned that Rosquete was to be a witness in the case, he obtained a short continuance over the weekend to examine the court file and public documents in the case of United States v. Patino, et al. in the Southern District of Florida. Both Rosquete and Claudina Leiros, another government witness in this case, had been charged with federal narcotics violations and had been tried in connection with the Patino matter. Co-counsel for the defendant examined the records in that case and was told by the court clerk that the court file was not complete, for example, the transcript had been destroyed by a fire which occurred after the trial (Tr. 908) and part of the file had been thrown away by mistake (Tr. 909). Although they were trying to reconstruct the common law records from extra copies of documents located in the trial judge's chambers, no transcript of any proceeding was available even if ordered because the

court reporter was on vacation for three months and no one else could transcribe his notes. Defendant was thus unable to review the bail hearing, which was a "highly contested matter" (Tr. 910) where Rosquete made representations regarding his past criminal records and his current activities which would have assisted defendant in his attack on the credibility of Rosquete as a witness in his trial. Also unavailable was the transcript of the sentence reduction event, which would have provided defendant with information regarding any representations, agreements, or promises that were made by Rosquete in return for a more lenient sentence. This testimony would have been clearly pertinent to defendant's inquiry at trial into Rosquete's motive for testifying.

Defense counsel's inquiries also uncovered the existence of a letter apparently written by Rosquete's wife at his direction requesting that Judge Mehrtens reduce the sentence imposed upon Rosquete after his conviction in the Patino matter. Defendant was particularly interested in finding this letter because similar letters by Claudina Leiros had served as the basis for significant discrediting cross-examination in the instant case (Tr. 669-86, 746-52). Moreover, defendant knew that Manuel Noa, a co-defendant in the Patino case who had been convicted along with Leiros and Rosquete, had on the same date written a similar letter to Judge Mehrtens, which arrived in an officially franked U.S. Justice Depart-

ment envelope. This suggested that the government was involved in helping Noa get his sentence reduced and defendant was entitled to explore whether special arrangements were also being made for Rosquete in exchange for his testimony against defendant. This area was of particular interest to the defense because counsel's investigation of the Patino court file had uncovered an order dated November 24, 1974, by Judge Mehrtens vacating Rosquete's seventeen-year prison sentence, deferring imposition of sentence, and placing Rosquete on probation on the special condition that he continue to cooperate with all federal agencies (Tr. 915). This order was unusual in that Rosquete had been convicted under a federal law that mandated a prison term of at least five years and left no discretion to grant probation. Further investigation into the circumstances surrounding this extra-legal mitigation and its relationship to Rosquete's testimony at trial was certainly warranted.

The foregoing was made known to the trial court and defense counsel argued that because the court records had been so poorly kept, what with the fire, the loss of part of the court file, and the unavailability of the court reporter, defense counsel was unable to search the public record in the limited time made available to him in order to adequately prepare to cross-examine Rosquete. The defendant, therefore, made a motion for a continuance in order to com-

plete his investigation, or alternatively, "for an order of prohibition against the government from proceeding with this witness on the basis that my client is being denied his constitutional right of confrontation" (Tr. 926). This motion was ultimately denied by the Court (Tr. 952-3). Defense counsel then made a motion to go forward with the trial but put over the testimony of Rosquete until such time as the defense could obtain transcripts of the bail hearing and sentencing proceeding (Tr. 953-4). This motion was also denied (Tr. 955) and Rosquete was examined by both sides.

The potential prejudice accruing to defendant may be simply illustrated by the sentence reduction catch. Undisputably Judge Mehrtens' order in fact "deferred" future sentencing and placed Rosquete on probation on the "special condition" that he "shall continue to cooperate with all federal agencies" (Tr. 1081). However, Rosquete denied knowledge of this order or that future sentencing hung over him (Tr. 1068-74; 1078-82), and the defense was unable to dispute his assertion because it was denied the opportunity to obtain the transcript of the sentence reduction proceeding (Tr. 911-12, 923-31, 943, 953-55, 996-1000, 1825-26). Thus, the jury weighed Rosquete's credibility without any proof that he was aware he sat in a Damoclean chair.

Moreover, the prosecutor was able to argue to the jury over objection, that Rene Rosquete's sentence had in fact been served since the "deal" resulted in his completing four years of an otherwise 17-year sentence -- without any reference to the "special," indeed, extraordinary condition (Tr. 1780-81, 1825-26). This misrepresentation in violation of Giglio v. United States, 405 U.S. 150 (1972) may have succeeded and the jury may have been deprived of knowledge that Rosquete was testifying under the sword solely because, thanks to the prosecution, the defendant had no opportunity prior to or during trial to obtain a simple public record.

Subsequent discoveries by defense counsel indicated even further the necessity in fairness to have Rosquete's testimony stricken from the record. The government submitted to defense counsel a document identified as Government Exhibit 3500-72 A, which was a translation by an official interpreter from the original Spanish handwritten notes prepared by Rosquete. The notes concerned matters about which Rosquete testified on direct examination (Tr. 1059). These notes were prepared under the supervision of an experienced government agent (although it later appeared that Agent Dugan had not participated in their preparation but rather an Agent Perry) who was or should have been aware of the requirements of 18 U.S.C. §3500 and defendant's right to view the original documents. The originals, nonetheless, were mysteriously unavailable. Defendant was thus forced to accept the

official interpreter's translation of notes that probably contained slang and ambiguities as his basis for cross-examination of Rosquete. Cf., Alderman v. United States, 394 U.S. 165, 182 (1969). Defendant moved to strike the direct testimony of Rosquete on the ground that the penalty provision of 18 U.S.C. §3500 was applicable because the government agent had been at the very least "grossly negligent" in failing to preserve the original notes (Tr. 1059). Appellant cited the decision in United States v. Bryant, 49 F.2d 642 (D.C.Cir. 1971), which holds that the government has a duty to preserve materials discoverable under 18 U.S.C. §3500:

> Hence we hold that before a request for discovery has been made, the duty of disclosure is operative as a duty of preservation. Only if evidence is carefully preserved during the early stages of investigation will disclosure be possible later.
> (439 F.2d at 651.)

Ironically, had the Drug Enforcement Administration followed the Bryant court's order to establish and follow "rigorous and systematic procedures designed to preserve all discoverable evidence gathered in the course of a criminal investigation," 439 F.2d at 652, the original Rosquete notes would most probably have been preserved. The government chose instead to ignore the directive of Bryant (Tr. 1570-1571).

The trial court denied defendant's motion to strike, without comment. At the end of cross-examination of Rosquete, defendant moved for a hearing to discover what became of the

original notes and renewed his motion to strike Rosquete's testimony (Tr. 1153). The Court denied both motions on the basis of the holding in United States v. Perry, 471 F.2d 1057 (D.C. Cir. 1972) and on the Court's determination, without a hearing, that the failure to produce the original Rosquete notes did not result from either maliciousness or negligence on the government's part (Tr. 1154-5).

During its direct examination of Agent Dugan, the defense discovered for the first time that Agent Dugan had not supervised the preparation of Exhibit 3500-72 A. They further discovered that although Dugan had prepared the interview notes regarding an interview with Rosquete (Government Exhibits 3500-76 and 3500-81), he had not used an official interpreter but had relied on either Manual Noa or Felix Martinez to interpret Rosquete's remarks. Both Noa and Martinez were cooperating narcotics traffickers who testified in court before and had themselves both required the use of a court interpreter on grounds that they were not fluent in English (Tr. 1535). Finally, it appeared that Government Exhibit 3500-75, which defendant's counsel had understood to be notes prepared by Agent Dugan, were really notes prepared by Agent Perry. Defendant immediately moved again to strike the testimony of Rosquete on the further ground that the government had failed to comply with 18 U.S.C. §3500 and this failure had compromised defense counsel's cross-examination of Rosquete. The government and the

defense agreed to a stipulation that may have mitigated the confusion caused the jury by the mistaken belief that Agent Dugan supervised the preparation of Government Exhibit 3500-72 A, but the confrontation part of the impeachment remained unsatisfactory. The Court ultimately denied defendant's renewed motion to strike the testimony of Rosquete (Tr. 1571).

The mistakes were made by the government with respect to Government Exhibit 3500-72 A (incorrectly assuming that Dugan had supervised the preparation of these notes, 3500-75 (incorrectly representing that these were Dugan's rather than Perry's notes), and 3500-76 and 3500-81 (not informing the defense that these were prepared by Dugan with interpreters that were barely literate in English), adversely affected defendant's cross-examination of Rosquete. Defense counsel based several of its questions on cross on Exhibit 3500-72 A and 3500-75; some of these questions were phrased so as to refer to Agent Dugan. The confusion that this caused the witness and the resulting ambiguity of her answers undermined the effectiveness of the examination. Defense counsel laid the foundation on cross for impeachment by referring to these exhibits so that Dugan could be called later to contradict Rosquete. Not only was defense counsel embarrassed before the jury when Dugan was unable to contradict Rosquete's responses, counsel's strategy was prejudicially disrupted by the error, whether in good faith or not, of the prosecution.

The prosecution's mistakes were not discovered until after Rosquete left the stand. Therefore, defendant was denied the opportunity to effectively cross-examine him; it was too late to devise another strategy. The only remedy available to the trial court was to strike the testimony of Rosquete or declare a mistrial. The failure to do either is error requiring reversal.

It seems clear that the failure to afford the appellant the opportunity to effectively investigate and prepare his cross-examination of Rosquete, when coupled with the witting or unwitting errors of the prosecution which prevented the defense counsel from effectively cross-examining Rosquete with the information that was at his disposal, deprived defendant of the right to confront the witnesses against him and his right to due process of law. Had a list of co-conspirators been provided to the defense in advance of trial, there would have been ample opportunity for investigation and preparation. However, the government chose to "play it close to the vest." Had there been obedience to the 1971 edict of the Bryant court, rigorous and systematic procedures would have preserved and clearly identified much discoverable evidence which was lost in the muddle. By its own actions more consonant with the sporting theory of justice than with an impartial quest for the truth, the prosecution has infringed upon constitutional rights of defendant. This prejudice could have been cured had the trial court

merely granted a continuance or applied the more strict remedy of striking Rosquete's testimony.

Unfortunately, neither the prosecution nor the trial court chose to protect the rights of the defendant. The trial court's failure to grant the pretrial motion and refusal to permit the defendant time to prepare his cross-examination of Rosquete and the prosecution's failure to adhere to the spirit of Bryant and 18 U.S.C. §3500 unfairly prejudiced defendant. This Court should, therefore, reverse his conviction and remand the case for a new trial.

II

THE DEFENDANT WAS DENIED DUE PROCESS AND THE OPPORTUNITY TO PRESENT A DEFENSE BY THE CONDUCT OF THE PROSECUTOR IN NOT DISCLOSING TO THE COURT OR DEFENSE COUNSEL THAT HIS LEAD ACCOMPLICE WITNESS HAD JUST ASSAULTED A FELLOW INMATE AND WAS THEREFORE SUBJECT TO PROSECUTION AND BY THE RULING OF THE TRIAL COURT DENYING ADMISSION OF THIS INFORMATION AND OF THE PROSECUTION'S FAILURE TO DISCLOSE IT.

On August 18, nearly a week after Wilfredo Risco had left the witness stand, the defense learned from a subpoena duces tecum (1) that on the morning of the day when the jury was selected a Deputy United States Marshal saw Risco assault fellow prisioner and co-conspirator Gino Fantuzzi by taking a swing at him, the deputy separated the men, and observed another prisoner with injuries to both eyes; (2) that the deputy then saw fit to and did prepare an official incident report of the event; (3) that the prosecutor, Assistant United States Attorney Fried, was specifically notified, yet he did not advise the Court or the defense counsel of this assaultive behavior by his intended leadoff witness (Tr. 904-05, 1492-1504).

When the defense learned of this course of events, it offered to prove the witness' misconduct as extrinsic impeachment evidence (showing a source of bias or interest, i.e., fear of potential prosecution) and the prosecutor's failure to disclose as spoliation of evidence (showing affirmative weakness of the government's case). The prosecution objected on grounds of relevance (but otherwise stipulating

to the facts). The Court rejected the defense offers and thereby denied the defendant basic rights of confrontation and due process (Tr. 1492-1504, 1650-52).

In the Court below the prosecutor did not deny knowledge of his duty as spelled out in such cases as United States v. Bonanno, 430 F.2d 1060 (2d Cir.), cert. denied, 400 U.S. 964 (1970) and United States v. Padgent, 432 F.2d 701 (2d Cir. 1970) to advise the Court or defense counsel of impeaching information which may be helpful to the accused (Tr. 1495-97). Indeed, when the Court asked the prosecutor "Why didn't you reveal that earlier?", he replied "No reason" (Tr. 1499).

United States v. Padgent, supra, is entirely instructive that a government witness may be impeached by proof of apparent criminal behavior, in that case bond jumping, which would subject the witness to possible prosecution by the government and therefore have the tendency to cause the witness to color his testimony accordingly. See Davis v. Alaska, 415 U.S. 308 (1974) (Burger, C.J.), for the Supreme Court's recent enthusiastic endorsement of this proposition on Confrontation Clause grounds.

Plainly, the

> "persistent defense attempt to show that [Risco] had a motive to cooperate with the government . . . should have 'flagged' the prosecutor's attention to the need to disclose the existence of the [evidence of assault], since it was unlikely that the defense would intentionally forego such a useful piece of evidence."
>
> United States v. Bonanno, supra, 430 F.2d at 1062 (footnote omitted).

In this case the non-disclosed evidence was of a type which "could scarcely have failed to attract and sustain prosecutorial awareness", United States v. Keogh, 391 F.2d 138, 147 (2d Cir. 1968). Surely the prosecutor must have been traumatized when he learned that at the very moment he was picking a jury his leadoff witness was engaged in a fist fight with a co-conspirator who may well have been intended as the prosecutor's fifth witness. Undoubtedly the prosecutor was struck with visions of the defense exploiting this fracas and the law abiding behavior of his rehabilitated cooperating witness, Wilfredo Risco. The failure to disclose is simply unforgiveable.

The incident report was admissible to impeach Risco, but the prosecutor's suppression of this information was also admissible as substantive evidence of the weakness of the prosecution's case. E.g., United States v. Remington, 191 F.2d 246, 251 (2d Cir. 1951); Hicks v. Hiatt, 64 F.Supp. 238, 246 & n.19 (M.D. Pa. 1946). See generally, 2 Wigmore, Evidence §278 (3d Ed. 1940). As stated by Chief Judge Swan speaking for the Second Circuit Court of Appeals in United States v. Remington, supra:

> "Evidence of efforts to supress testimony or evidence in any form like the spoliation of documents is affirmative evidence of the weakness of the prosecution's case." (footnote omitted.)

The spoliation doctrine is entrenched law and the court's refusal to admit the evidence, for both offered purposes, infringed the defendant's right of compulsory process and his fundamental

right to present a defense. Cf., Chambers v. Mississippi, 410 U.S. 284 (1973) (Powell, J.).

The trial court apparently based its ruling on the conclusion that the incident report contained no evidence of assault (Tr. 1502, 1651-52). The ruling evidently rests upon a misconception of the nature of assault:

> "You have indicated that the witness Risco may have been charged with assault. There has been no evidence that there has been an assault here by Risco. He indicates he only saw him swinging. There is no indication here how Mr. Pinero [sic] got a cut on the eye so I'll deny your motion - cut over the eye. I think it may be misleading."
>
> (Tr. 1502) (emphasis added)

BLACK'S LAW DICTIONARY 147 (4th Ed. 1968) defines "assault" as follows:

> "An intentional, unlawful offer of corporal injury to another by force, or force unlawfully directed toward person of another, under such circumstances as create well-founded fear of imminent peril, coupled with apparent present ability to execute attempt, if not prevented."
>
> (citations omitted)

Thus, as argued by counsel below, (Tr. 1503), a swing is as good as a hit. See 18 U.S.C. §113.

The incident report made out a prima facie case of assault, more than ample evidence to raise a question for the jury as to the meaning of the events recounted. See, e.g., Young v. United States, 309 F.2d 662 (D.C. Cir. 1962) (Burger, J.). Therefore, the defense was not obliged to offer further proof in the nature of testimony from hostile witnesses

as suggested by the prosecutor (Tr. 1498-99, 1503-04). The prosecution's answer should have been to call any rebuttal testimony available if the stipulated incident report was misleading, not to supress knowledge of the circumstances in the first place and fourteen days later object on grounds that the defendant's offer of proof is not strong enough.

In conclusion, the prosecution was caught sitting on dramatic evidence which the defense should have had in cross-examining Risco and which the jury should have had in evaluating his testimony. This occurrence constitutes evidence that the prosecution felt it necessary on at least one provable occasion to breach its constitutional duty of disclosure rather than maintain its cause by proper means, telling evidence which the jury should have had in mind in evaluating the government's entire case. The prosecution's wilful nondisclosure -- which has prejudiced the defendant's right to a fair trial and "polluted" "the waters of justice" -- has earned reversal of the conviction obtained below. Cf., Mesarosh v. United States, 352 U.S. 1, 14 (1956).

III

THE PROSECUTION'S REFERENCE IN FINAL ARGUMENT TO DEFENDANT'S FAILURE TO PRESENT EVIDENCE REFUTING ITS WITNESSES WAS IMPROPER AND VIOLATIVE OF THE FIFTH AMENDMENT SINCE IT CAST A BURDEN ON THE DEFENDANT NOT IMPOSED BY THE LAW AND NATURALLY AND NECESSARILY HIGHLIGHTED IN A CRITICAL FASHION THE FACT THAT THE DEFENDANT EXERCISED HIS RIGHT NOT TO TESTIFY.

It has long been the law in federal courts that remarks about the defendant's failure to take the stand constitute reversible error. Such statements infringe upon the defendant's presumption of innocence and violate his Fifth Amendment right against self-incrimination by converting silence to evidence of guilt. 18 U.S.C.A. §3481; Wilson v. United States, 149 U.S. 60 (1893); Griffin v. California, 380 U.S. 609 (1965). The test for determining whether a statement before a jury by the judge or prosecutor was an improper comment upon a defendant's failure to testify has been defined as whether the language used was manifestly intended or was of such a character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify. United States v. Williams, 503 F.2d 480, 485 (2d Cir. 1974); Haberstroh v. Montanye, 493 F.2d 483 (2d Cir. 1974) (per curiam). Direct and indirect references by a prosecutor to an accused's decision not to testify and to rely on the presumption of innocence have on more than one occasion been the basis for reversal of a conviction. See, e.g., Griffin v. California, supra; United States v. Flannery, 451 F.2d 880 (1st Cir. 1971); Rodriguez-Sandoval v. United States, 409 F.2d 529 (1st Cir. 1969);

United States v. Davis, 357 F.2d 438 (5th Cir. 1966); Carlin v. United States, 351 F.2d 618 (5th Cir. 1965); Desmond v. United States, 345 F.2d 225 (1st Cir. 1965); Barnes v. United 8 F.2d 832 (8th Cir. 1925).

In the case at bar, defendant chose not to testify or to present an affirmative defense; rather, he relied on his Fifth Amendment right to remain silent and on the presumption that an accused is innocent until proven guilty beyond a reasonable doubt by the prosecution. The defense's cross-examination of the four government witnesses and its direct examination of witnesses Dugan, Bocchichio, and Moran were devoted to demonstrating that the government's witnesses had a motive to commit perjury and thus were not credible.

During his final argument, the prosecutor clearly implied that the jury should consider the defendant's failure to testify in determining defendant's guilt or innocence. On one occasion, the prosecutor was attempting to argue that the government's witnesses had no motive to testify falsely against defendant because defendant could then affirmately prove that their testimony was false, thus providing a basis for a charge of perjury and getting the witnesses into even more trouble with the government. In the course of this gambit, the prosecutor said:

> "Let's go a little further. Let's assume that the man in the room proves otherwise. When Claudina Leiros takes the stand she knows that a defendant in this county has the right to present evidence . . . ."
> (Tr. 1783) (emphasis added)

Defense counsel immediately moved for a mistrial on the basis of Griffin v. California, supra, and a heated colloquy ensued:

> "Mr. Krieger: Oh, that is objectionable. I move for a mistrial. Griffin against California, if the Court please. That is outrageous in this court. Imposing a burden on the defendant!
>
> "Mr. Fried: I am not imposing any such burden, your Honor. I am stating that a defendant has a right under this system to prove something.
>
> "Mr. Krieger: That is inadmissible and is aggravated by the repetition. Mr. Fried is an experienced lawyer and he knows he can't do that!
>
> "The Court: Motion denied.
>
> "Mr. Krieger: I respectfully ask the Court to instruct Mr. Fried to conduct his summation within the rules of law.
>
> "The Court: I'm sure Mr. Fried will do that."
>
> (Tr. 1783-4) (emphasis added)

The prosecutor here made three distinct and unmistakable references to the accused's opportunity to "prove something" in a case where the accused had chosen not to testify or to offer any affirmative defenses but to rely on the government's case. The natural and necessary implications of the prosecutor's comments are threefold: First, the jury might infer that defendant has the burden of either testifying or introducing evidence to rebut the testimony of prosecution witnesses, e.g., Claudina Leiros. Indeed, where each of the government witnesses testified crucially to direct

conversations and negotiations with the defendant, the prosecutorial insistence that the defendant had an obligation, which was not met, to present evidence could only have drawn critical attention to the fact that the defendant "had not taken the witness chair to deny or give his version of the affair" and "emphasized [the defendant's] testimonial silence." Kelly v. Stone, 514 F.2d 18 (9th Cir. 1975) (per curiam). Second, the jury might infer from the prosecutor's comments that defendant's failure to exercise his "right . . . to prove something" is evidence that he is unable to prove anything, i.e., his innocence, and is therefore guilty. Finally, the prosecutor's remarks imply that the government witnesses would not testify falsely because the accused could disprove their testimony; therefore, these witnesses must be testifying truthfully because the accused did not attempt to disprove their statements. The accused's choice to remain silent is thereby improperly used by the prosecutor as evidence of his witnesses' credibility.

Not content to leave bad enough alone, on two subsequent occasions the prosecutor improperly suggested that the defendant had the burden on cross-examination of government witnesses to contradict their testimony. While reviewing the cross-examination of Luis Eureta-Morales, the prosecutor said:

> "The purpose, Ladies and Gentlemen, I would submit the purpose of cross-examination is to test the credibility, to test the believability of the witnesses that

take the stand, to determine through the process of cross-examination whether they are telling the truth or whether they are lying, whether the witnesses are in fact sitting in that witness [chair] and being honest to the Oath that they have taken before you.

"And in that connection I would submit that cross-examination of the government witness would be done in part to elicit information concerning the testimony of that government witness about the defendant. I would suggest, therefore, that it would be useful for you to examine the cross-examination conducted by Mr. Krieger to see what information was elicited from -- for example, Rene Rosquete, concerning his transactions with -- directly with, and his testimony, with Alfonsito."

(Tr. 1807-8) (emphasis added.

At this point, counsel for defendant objected on the ground that, "What he is doing now is saying that there is a burden upon the defendant to contradict certain testimony" (Tr. 1808).

"Mr. Fried: As I was saying, I would suggest that you examine the cross-examination of Luis Ureta concerning his dealing with the defendant Alfonsito. And if you do so, you will find that not one question was asked of Ureta concerning his meeting -- his only meeting with the defendant Alfonsito in February of 1970.

"Mr. Krieger: I hate to interrupt, but I am constrained to protect the rights of my client, Your Honor, and I think that this is a grievous error. And I therefore ask for the withdrawal of a juror and a declaration of a mistrial because [of] the assaultive effect of this inferential comment about the defendant to mount a specific defense. There is no such burden, if the Court please." (Tr. 1809-10)

The defense's motion was denied.

The impropriety of the first comment is that it suggests that the accused has a burden to develop contradictions during cross-examination. The impropriety of the second comment is manifest; by saying that "You will find that not one question was asked of Ureta concerning his meeting" with the defendant, the prosecutor suggested that the failure to attempt to contradict is itself evidence that the witness' testimony is true.

Courts considering cases involving improper comments by prosecutors regarding an accused's failure to testify often rely on the existence of an immediate and forceful curative instruction by the trial court in reaching the conclusion that the error was harmless:

> If the line between the permissible and the impermissible in this area is not always clear, nevertheless where the intent and the effect of the statement is ambiguous, limiting instructions may suffice to cure any harm. United States v. Nasta, 398 F.2d 283 (2d Cir. 1968).
>
> United States v. Gatto, 299 F.Supp 697 (E.D.Pa. 1969).

Here, however, no immediate cautionary instruction was given in response to defense counsel's objections.* In fact, the

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* The defense not only objected contemporaneously to the prosecutor's argument but also at the immediate conclusion renewed its motion for a mistrial, unsuccessfully, and then moved specifically for a curative instruction. Decision on this latter request was reserved until the close of the Court's charge (Tr. 1820-22), at which time it was denied (Tr. 1861-62).

trial court's summary denial of each of the objections had the effect of giving the Court's own blessing to the improper suggestions implicit in the prosecutor's comments. Such prejudice could not easily be eradicated by the Court's instructions given at the beginning and close of the case.

The Supreme Court has said: "The minds of the jurors can only remain unaffected by this circumstance [comment upon an accused's failure to testify] by excluding all reference to it." Wilson v. United States, 149 U.S. 60 (1893). Where there has been repeated prejudicial comment upon an accused's decision not to testify or offer an affirmative defense, "correction of error should be as prompt and timely as possible -- particularly where the error involves the infringement of a constitutional right." Desmond v. United States, 314 F.2d 243 (D.C. Cir. 1962); Smith v. United States, 268 F.2d 416 (9th Cir. 1959).

> It is true, however, that ambiguous language, which indirectly invites the jury's attention to the accused's failure to take the stand, will, if not cured by prompt instructions, be grounds for setting aside a subsequent conviction.
>
> United States v. Fay, 349 F.2d 957 (2d Cir. 1965).

This case turned on the credibility of the government's witnesses. The impact of a subtle allusion to the defendant's decision to remain silent could be very great where so much depended on the jury's evaluation of intangibles. Here the

improper comments of the prosecutor were clear and repeated. No immediate cautionary instruction was given even though defense counsel raised his objection in a timely and vigorous fashion. These considerations indicate that the jury might naturally and necessarily have considered the defendant's exercise of his Fifth Amendment right to silence in reaching its verdict as a result of the prosecutor's comments. Therefore, the failure to grant defendant's motion for a mistrial was error requiring reversal of the conviction and a new trial. E.g., Kelly v. Stone, 514 F.2d 18 (9th Cir. 1975) (per curiam).

IV

DEFENDANT'S CONVICTION SHOULD BE REVERSED SINCE THE TRIAL COURT ERRED IN FAILING TO INSTRUCT THE JURY UPON REQUEST AS TO THE APPLICABLE LAW AND ISSUES IN THE CASE.

In our Country the commitment of fact-finding in criminal trials to lay juries represents a profound value judgment. Duncan v. Louisiana, 391 U.S. 145 (1968). Just as it is the jury's special and sacred duty to find the facts fairly and impartially, it is the obligation of the presiding judge to inform the jury of all possible relevant law so that the jury may perform its unique function. E.g., Strauss v. United States, 376 F.2d 416, 419 (5th Cir. 1967). The Court below, however, refused defense requests to instruct the jury as to defense theories of the case based upon the demonstrated interest of the government accomplice witnesses to inculpate others in order to seek favor with the government and upon the five-year statute of limitations governing the offense charged.

As stated by the Court in United States v. Grimes, 413 F.2d 1376, 1378 (7th Cir. 1969):

> We start with the proposition that the defendant in a criminal case is entitled to have the jury consider any theory of the defense which is supported by law and which has some foundation in the evidence, however tenuous. Tatum v. United States, 88 U.S.App. D.C. 386, 190 F.2d 612, 617 (D.C.Cir. 1951); United States v. Phillips, 217 F.2d 435,442-443 (7th Cir. 1954).

This proposition was well elaborated by Circuit Judge Goldberg speaking for the Fifth Circuit Court of Appeal in Strauss v. United States, 376 F.2d 416, 419 (5th Cir. 1967):

> "It is elementary law that the defendant in a criminal case is entitled to have presented instructions relating to a theory of defense for which there is any foundation in the evidence." Perez v. United States, 5 Cir. 1961, 297 F.2d 12, 13-14. [emphasis added]. We find no requirement that a requested charge encompass, in the trial judge's eyes, a believable or sensible defense. The judge is the law-giver. He decides whether the facts constituting the defense framed by the proposed charge, if believed by the jury, are legally sufficient to render the accused innocent. The jury is the fact-finder. If the trial judge evaluates or screens the evidence supporting a proposed defense, and upon such evaluation declines to charge on that defense, he dilutes the defendant's jury trial by removing the issue from the jury's consideration. In effect, the trial judge directs a verdict on that issue against the defendant. This is impermissible. Bryan v. United States, 5 Cir. 1967, 373 F.2d 403. The judge must, therefore, be cautious and unparsimonious in presenting to the jury all of the possible defenses which the jury may choose to believe. We hold that where the defendant's proposed charge presents, when properly framed, a valid defense, and where there has been some evidence relevant to that defense adduced at trial, the the trial judge may not refuse to charge on that defense.

Respectfully, in the instant case trial court did not meet its obligation to "be cautious and unparsimonious in presenting to the jury all possible defenses which the jury may choose to believe."

A. The Defendant Was Entitled to Have the Jury Specifically Informed by the Presiding Judge that His Position or Theory of the Case -- to wit, that the Witnesses Against Him Were Testifying in Order to Extricate Themselves from Their Own Troubles -- Was a Legitimate Defense.

The basic defense at trial to the charges contained in the indictment was an attack upon the credibility of the government's accomplice witnesses, that is, reliance through cross-examination upon their general lack of character and specific and overwhelming interest in producing testimony for the government inculpating others in criminal violations, in desperate hope of extricating themselves from their own difficulties. Defendant requested the Court to find some way of communicating to the jury through the office and authority of the Court what the defendant's position or theory of the case was (Tr. 1644-45). And defendant submitted a suggested jury instruction stating his basic position. The trial court responded by stating its belief that it would be "presumptuous" of it to grant any such instruction and added that it was not "propounding the theory of the Government":

> As to whether the defendant's theory is or what the Government's theory is, what they have proven, as I indicated to you some time ago, I'm not going to go into a marshalling of the evidence or comment on the introduction of the evidence. I think to instruct the jury on what the defendant's theory is, is presumptuous of me, and almost tantamount to my indicating how the jury should indicate the testimony -- how the jury should weigh the testimony of the witnesses. That's without any -- without citing any authority for that. That's just my feeling as a judge. It would be like my putting

> in a defense for the defendant. I'm not putting in a defense for the Government, nor propounding the theory of the Government. (Tr. 1646-47)

Defense counsel's answer to the trial court's feeling was as follows:

> But as I understand the law, the defendant does have a right to have his theory of the case submitted to the jury. It is not presumptuous on the part of the Court because the Court reads the indictment to the jury and instructs them about the indictment. Essentially, that's the Government's theory of the case. And the defendant's defense or answer to those charges is what is ordinarily embodied in the defendant's theory of the case instructions.
>
> And I think it's universally considered an appropriate role for the Court. (Tr. 1647-48)

Nonetheless, the Court gave the jury no instruction expressly informing them of the defendant's answer to the charges in the indictment and that such an answer is a legitimate defense.

Defense counsel did not misstate the objections of jury instructions in criminal cases. Long ago the United States Supreme Court endorsed the proposition that jury instructions should, among other things, ". . . point out the essentials to be proved on the one side and the other. . . ." Bird v. United States, 180 U.S. 356, 361 (1901). Nor can there be any doubt that the claim that the defendant has been framed by accomplice witnesses seeking to gain favor with the government is a legitimate defense requiring an appropriate

theory of the defense instruction. United States v. Vole, 435 F.2d 774 (7th Cir. 1970). And, needless to say, such a defense can be, and indeed, usually is, put in by cross-examination rather than as an affirmative defense. See, United States v. Phillips, 217 F.2d 435 (7th Cir. 1955). Since there was an evidential basis to believe that the government's accomplice witnesses had a great interest in producing testimony incriminating others who could be prosecuted by the government and that the government bargained dearly for such testimony, the trial court committed reversible error by failing to instruct the jury as to this theory of the case.

The law is settled entitling the defendant to have the Court present instructions relating to any theory of defense for which there is "any foundation" in the evidence. In the leading and oft-quoted case of Tatum v. United States, 190 F.2d 612, 617 (D.C.Cir. 1951), the Court stated:

> We do not intend to characterize the case for the defense as either strong or weak. That is unnecessary, for "in criminal cases the defendant is entitled to have presented instructions relating to a theory of defense for which there is any foundation in the evidence, even though the evidence may be weak, insufficient, inconsistent, or of doubtful credibility. . . ."
>
> (emphasis added) (footnote omitted)

Indeed, the evidence relevant to the issue need not even be sufficient to raise a reasonable doubt in order to require a jury instruction. Tatum v. United States, supra, 190 F.2d

at 615-16. As stated by the Supreme Court in Stevenson v. United States, 162 U.S. 313, 315 (1896), reversing a murder conviction obtained at a trial where the jury was deprived of an instruction upon the subject of manslaughter:

> The evidence might appear to the court to be simply overwhelming to show that the killing was in fact murder, and not manslaughter, or an act performed in self-defense, and yet, so long as there was some evidence relevant to the issue of manslaughter, the credibility and force of such evidence must be for the jury, and cannot be matter of law for the decision of the court.
>
> (emphasis added)

And as stated by Chief Justice (then Circuit Judge) Warren E. Burger in Young v. United States, 309 F.2d 662, 663 (D.C.Cir. 1962), reversing a conviction for assault with intent to commit robbery obtained at a trial where the District Court failed to give a requested charge on the lesser included offense of simple assault:

> However implausible, unreliable or incredible only the jury had the right to make the evaluation of West's testimony. The evidence of a simple assault cannot be regarded as strong or convincing and perhaps the source could well be regarded as of dubious reliability, but the question of its weight and credibility was for the jury.

In short, the defendant is entitled to have the Court's imprimatur placed on any theory, "however implausible, unreliable or incredible," Young v. United States, supra, so long as "the evidence would permit a jury rationally" to acquit

him if the theory be credited. Keeble v. United States, 412 U.S. 205, 208 (1973).

The present case drips with evidence that the government's accomplice witnesses used their testimony against defendant "as a bargaining lever on their own charges." See, United States v. Vole, 435 F.2d 774, 777 (7th Cir. 1970). As in Vole, there is evidence here that these witnesses received favors with respect to sentencing and extradition in exchange for their cooperation with the government. Moreover, there is further evidence of false testimony. Some of the witnesses did not besmirch the defendant, Mr. Alfonso, until, one, long after they had been arrested by federal authorities and, two, even after they had given their first statements to government agents (e.g., 773-787). The fact that the alleged crimes of defendant were not revealed even when some of the witnesses started cooperating with the government surely is some evidence permitting the inference that the eventual testimony inculpating defendant was manufactured in the quest for freedom. And there was evidence, as illustrated in the testimony of Rene Rosquete seeking to shield his wife and his mother (Tr. 1082-95, 1146; 1137-39), that the witnesses, as in Vole, had a propensity to cover up the person or persons who were the true criminals they were dealing with.

In conclusion, there was plentiful relevant evidence serving as a foundation for the defendant's request to have

the majesty of the law, and the authority of the presiding judge, placed explicitly and squarely behind the only theory of defense which the defendant was able to mount against the stale but heinous charges hurled at him by the government's criminal witnesses. Defendant is entitled to a new trial where the jury is properly instructed.

B. Similarly, the Defendant Was Entitled to Have the Jury Instructed that It Should Acquit Him if the Crime Occurred Prior to Any Time Within the Applicable Five-Year Statute of Limitations.

It is hardly necessary to repeat the proposition that the defendant is entitled to an instruction informing the jury of any defense with a conceivable evidentiary foundation. Nor is it necessary to elaborate what an important and salutary safeguard the statute of limitations is in criminal cases. See, Toussie v. United States, 397 U.S. 112, 114-15 (1970). These, we assume, are granted. Unfortunately, the trial court did not grant the defendant's request to inform the jury of the statute of limitations problem which he submits is supported by the evidence in this case (Tr. 1649-50).

The indictment was returned on December 12, 1974. Accordingly, the defendant could not lawfully thereby be prosecuted, tried, or punished for any narcotics offense committed prior to December 12, 1969. See, 18 U.S.C. §3282. Yet the only narcotics transaction with the defendant testified to by the witness Rene Rosquete occurred "at the very beginning of December," "the first day" or the "first days" of December (Tr. 1096). Thus, if the jury credited only Rene Rosquete, or concluded that this sale of heroin was the only and last overt act proven beyond a reasonable doubt, or concluded that the conspiracy charged terminated at this time, Mr. Alfonso's conviction was predicated upon an offense barred by the statute of limitations. Nor is it irrational that a jury might so conclude.

To begin with, it is the law and the jury in this case was instructed that "It is the exclusive and sole province and duty of the jury to judge the facts in the case and to consider and weigh the evidence for that purpose" (Tr. 1832). And, "As to witnesses who may have admitted lying at a prior trial or otherwise in the past, you should consider their testimony and decide whether you wish to accept or reject it in whole or in part" (Tr. 1840). There was evidence that each of the government's witnesses had lied in the past but, for reasons of innerent probabilities, demeanor, or other intangibles, the jury may have been not convinced beyond a reasonable doubt that Risco, Leiros, and Eureta-Morales were telling the truth but nonetheless convinced that Rene Rosquete was, at least as to the early December transaction. Such a discrimination was fully within the province of the jury as fact-finder. Indeed, if the jury was repelled by the other witnesses it may well have based its decision on the one clear heroin transaction between Rosquete and the defendant as testified to by that witness (Tr. 1017-20, 1096). The defendant's inability to adequately confront and cross-examine Rosquete heightens this danger. (See Argument Point II above.) Perhaps most telling of all, however, is that the prosecutor himself argued to the jury that, "If you believe Rosquete alone, you can convict, without any other evidence" (Tr. 1816).

In United States v. Borelli, 336 F.2d 376, 382-87 (2d Cir. 1964) (Friendly, J.), the Court reversed the defendants' convictions for conspiracy to violate narcotics laws since the trial court failed to instruct the jury as to the statute of limitations. See also, Grunewald v. United States, 353 U.S. 391 (1957). The specific question in Borelli was whether the defendants had associated themselves with a single continuing conspiracy to import narcotics or whether their agreement was only to the first phase of a more limited and earlier plot now barred by the statute. Defendant submits that the evidence herein would permit the jury to conclude that the only agreement to violate the narcotics laws proved by the government beyond a reasonable doubt was the limited relationship between the defendant and Rene Rosquete, the single overt act of which was completed more than five years prior to the founding of the indictment. Accordingly, because of the peculiar time/witness factor in this case, defendant was entitled to have the jury informed as to the statute of limitations problem and his conviction should be reversed as a result of that failure. United States v. Borelli, supra. Basic principles of criminal jurisprudence dictate this result.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 75-1395

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

OSWALDO ALFONSO-PEREZ,

Defendant-Appellant.

On Appeal from the United States District Court
for the Eastern District of New York

CERTIFICATE OF SERVICE

I hereby certify that I caused to be served three (3) copies each of the Brief for Appellant and Appendix in the above entitled cause by mailing upon each party required to be served by placing the foregoing copies in a postage pre-paid envelope and depositing said envelope in the United States mail on this 24 day of February, 1976, addressed as follows:

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CONCLUSION

For each of the foregoing reasons, the judgment below should be reversed and the case remanded for a new trial.

Respectfully submitted,

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